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Suzanna and —the Ninth Amendment

*Raoul Berger**

Suzanna Sherry pronounces that "the preliminary debate over the meaning of the ninth amendment is essentially over. . . . [A]ll but one contributor [to a recent symposium] agreed that the ninth amendment does protect judicially enforceable unenumerated rights."¹ A count of noses cannot settle so important an issue, for as Sidney Hook observed, "[W]hat makes a thing true is not who says it, but the evidence for it."² Sherry is long on assertion but short on facts. A fellow symposiast, Andrzej Rapaczynski, wrote that "for every interpretation that sees [the Ninth Amendment] as support for judicial activism there is another, respectable one, that does not."³ Sherry finds only one dissenter in the symposium, Michael McConnell,⁴ but cheek by jowl with her own contribution there is my dissenting article.⁵ Then too, Rapaczynski regards the amendment as of "very problematic" meaning;⁶ to another symposiast, Sanford Levinson, it is a "mystery."⁷ Last

* A.B. University of Cincinnati 1932; J.D., Northwestern University 1935; LL.M., Harvard University 1938. Honorary degrees from University of Cincinnati, University of Michigan, and Northwestern University.

1. Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988), reprinted in 2 THE RIGHTS RETAINED BY THE PEOPLE 283, 283 (Randy E. Barnett ed., 1993) [hereinafter RIGHTS RETAINED].

2. SIDNEY HOOK, PHILOSOPHY AND PUBLIC POLICY 121 (1980).

3. Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177 (1988) reprinted in 2 RIGHTS RETAINED, *supra* note 1, at 163, 163.

4. Sherry, *supra* note 1, at 283.

5. Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 RUTGERS L. REV. 951 (1990), reprinted in 2 RIGHTS RETAINED, *supra* note 1, at 297.

6. Rapaczynski, *supra* note 3, at 172 n.20.

7. See Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 143 (1988).

but not least, Robert Bork regards it as an "ink blot."⁸ So Sherry's exultation is premature.

Before moving to her argument in chief, I would protest against labelling all who differ with her and her fellows as the "New Right."⁹ Implicit in that label is the self-righteous assumption that activists alone are without political goals, although Paul Brest, a leading activist, pleaded with Academe "simply to acknowledge that most of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good."¹⁰ Speaking for myself, I am a lifelong liberal, and have ever endeavored to exclude my socio-political aspirations from evaluation of constitutional verities, often criticizing the Court for departing from the Constitution, although the decisions enlisted my sympathies on the merits.

Unless we are to view the Framers as "dimwitted," Sherry urges, we must believe that they did not distinguish between "the written, judicially enforceable Constitution and unwritten natural law."¹¹ They spoke, she reasons, of the "Constitution and unwritten natural law in the same breath . . . without distinguishing between the two, strongly suggest[ing] that they thought of unwritten rights as analogous" to the written "legal rights" of the Constitution. "To attribute to them any other conclusion strains credulity."¹² The "dimwitted" Chief Justice Marshall made this very distinction: "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. . . . [T]o what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"¹³ What is resort to natural law but the very attempt to pass the limits "by those intended to be restrained?"

8. *Nomination of Robert Bork to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary*, 100th Cong., 1st Sess. 249 (1987), reprinted in part in 2 RIGHTS RETAINED, *supra* note 1, at 427, 441.

9. Sherry, *supra* note 1, at 283.

10. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981).

11. Sherry, *supra* note 1, at 284-85.

12. *Id.* at 285.

13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The Framers, Marshall added, "contemplated that instrument, as a rule for the government of courts, as well as of the legislature." *Id.* at 180.

Not for nothing did Article VI clause 2 declare that "This Constitution . . . shall be the supreme Law of the Land."¹⁴ In place of "higher law" the Constitution itself was to be the "superior, paramount law."¹⁵ That which is paramount—supremely controlling¹⁶—cannot be superseded by natural law. "Law," Robert Cover observed, "as a sovereign act clearly mandated the subordination of natural law to constitutions."¹⁷ Suppose, however, that the Constitution makes no provision for a particular situation, or makes one of doubtful import, what then? Let Madison answer: "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution."¹⁸ Mark that by necessary implication Madison precluded resort to natural law.

Against Sherry's: the Framers spoke of the Constitution and natural law "in the same breath"¹⁹ let me oppose some facts. A pioneer student of natural law in America, Benjamin Wright, wrote of the Founding, "[t]here were few appeals to the law of nature . . . with rare exceptions they simply found it unnecessary to their purposes."²⁰ Consider Edmund Randolph's common-sensical observation in the Convention: "This . . . display of theory, howsoever proper in the first formation of state governments, is unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and *interwoven with* what we call the rights of states."²¹ Justice McLean put the matter shortly in *Miller v. McQuerry*, a fugitive slave case: "It is for the people . . . in making constitutions, and in the enactment of laws, to consider the laws of nature. . . . This is a field which judges can not explore."²² Tacitly, wrote Louis Henkin, "[f]ramers of

14. U.S. CONST. art. VI, cl. 2.

15. *Marbury*, 5 U.S. (1 Cranch) at 177.

16. FUNK & WAGNALLS, DESK STANDARD DICTIONARY (1946).

17. ROBERT M. COVER, JUSTICE ACCUSED 34 (1975).

18. 2 ANNALS OF CONGRESS 1950 (1834).

19. Sherry, *supra* note 1, at 285.

20. BENJAMIN F. WRIGHT, AMERICAN INTERPRETATION OF NATURAL LAW 125 (1931). No reference to "natural law" or the "law of nature" appears in the index of 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS].

21. 2 RECORDS, *supra* note 20, at 137 (editor's notes omitted).

22. 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9583).

constitutions and bills of rights distinguished between rights that preexisted society and civil rights enjoyed in society."²³

To illustrate the early climate of opinion, Sherry summons state judges who "used unwritten law to invalidate legislative actions."²⁴ For example, Judge Burke of South Carolina stated that "trial by jury is a common law right . . . originating in time immemorial."²⁵ "Time immemorial" is judicial fantasy. Justice Cardozo considered that trial by jury is not "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"²⁶ But I shall waste no time distinguishing state cases and shall consider instead some basic facts that render them inapposite. First, there is the distinction pointed out by James Wilson between the limited powers delegated to the federal government and the plenary powers enjoyed by the states, unless prohibited.²⁷ Second, state constitutions, if memory serves me, had no supremacy clause—their constitutions were not declared to be "the supreme law." A constitution which is the supreme, paramount law leaves no room for a judge to wander outside its confines.

There are telling items as to the *federal* practice of which Sherry makes no mention. She ignores the famous split between Justices Chase and Iredell in *Calder v. Bull*. Chase's mention of supra-constitutional principles was immediately rebutted by Iredell: "[T]he Court cannot pronounce [a statute] to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject."²⁸ The Framers were well aware that laws might offend against natural law and still

23. LOUIS HENKIN, DIGNITY AND CONSTITUTIONAL RIGHTS 213-14 (1992). "The underlying assumption" of the Virginia Constitution of 1776 "is that the rights of the individual have nothing to fear from majority rule exercised through legislative assemblies . . ." Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 403-04 (1928).

24. Sherry, *supra* note 1, at 285.

25. *Id.* at 289 (quoting *Zylstra v. Corporation of Charleston*, 1 S.C.L. (1 Bay) 382, 395 (1794)).

26. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). The slow development of trial by jury is traced by MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 204-18 (1936).

27. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (Jonathan Elliot ed., reprint ed., Ayer Company 1987) (1888); Levinson, *supra* note 7, at 140.

28. 3 U.S. (3 Dall.) 386, 399 (1798).

require enforcement. In the Convention Wilson said, "Laws may be unjust, . . . may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect."²⁹ George Mason spoke to the same effect.³⁰ In what may be regarded as a recantation *sub silentio*, Chase rejected a federal common law of crimes in *United States v. Worrall* saying, "the constitution of the Union is the source of *all* the jurisdiction of the national government; so that the departments of the government can never assume *any* power, that is not *expressly* granted by that instrument."³¹ Then there is Justice Story's observation respecting the powers of equity: if an English court possessed the "unbounded jurisdiction . . . arising from natural law and justice" ascribed to it, "it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised."³² Lastly, Chief Justice Marshall acknowledged in

29. 2 RECORDS, *supra* note 20, at 73.

30. *Id.* at 78. Such remarks are dismissed by Sherry as "a few scattered statements in the Federal Convention," Sherry, *supra* note 1, at 284, which presumably represented the Convention's sentiments, for it voted against inclusion of the Justices in exercise of the presidential veto. She prefers Thomas Grey's attribution to the Framers of a "belief in judicially enforceable natural rights." *Id.* Grey's article deals with pre-1787 "revolutionary thought." Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978). It is studded with pre-independence utterances, when "higher law" served to justify colonial resistance to Parliament's misrule. After independence, however, the Founders' distrust of judicial hegemony reemerged, as is reflected in Hamilton's assurance in *Federalist No. 78* that of the three branches the judiciary is "next to nothing." THE FEDERALIST No. 78, at 504 (Alexander Hamilton)(Sherman F. Mittel ed., sesquicentennial ed. 1937) (quoting MONTESQUIEU, 1 SPIRIT OF LAWS 186 (n.d.)). In 1791 Justice James Wilson explained that judges had been derived from a "foreign source . . . [and] were directed to foreign purposes. Need we be surprised, that they were objects of aversion and distrust?" JAMES WILSON, *Lectures on Law*, in 1 THE WORKS OF JAMES WILSON 69, 292 (Robert G. McCloskey ed., Belknap Press 1967) (1804). He felt constrained to exhort his fellow citizens that it was time to "chastise our prejudices." *Id.* at 293.

More cautious than Sherry, Grey acknowledges that the effect of a "written constitution" on "the idea that judicially ascertainable fundamental law could itself have constitutional status remains to be carefully analyzed," and that it "remains to be shown" that "noninterpretive judicial review was consistent" with "popular sovereignty." Grey, *supra*, at 893. Haines noted that "it is customary to assert that the doctrine of natural rights and natural law has had little acceptance as a basis for judicial decisions in the public law of the United States." Charles G. Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 625 (1916).

31. 28 F. Cas. 774, 779 (C.C.D. Pa. 1798) (No. 16,766) (emphasis added).

32. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 9 (5th ed. 1905).

The Antelope that slavery was abhorrent to natural law, but held that long usage had made it legal under the "law of nations."³³ Whatever the views of state judges, they must yield to the course of the federal law.

In one of her wildest flights of fancy Sherry concludes that to eschew "the temptation to view judging as a mechanical act," the Framers fashioned the Ninth Amendment as "their safeguard,"—this in a "century in which judges were expected merely to discover the law,"³⁴ not to make it. Vainly will the reader search the history of the Bill of Rights for evidence that the Ninth Amendment was to "safeguard" judicial freewheeling. To the contrary, the Bill of Rights was meant to "limit," not to enlarge, federal powers.³⁵ The fact is that judges were suspect, unlikely repositories of unbridled discretion.³⁶ Sherry gives scant weight to the fact that, as the Declaration of Independence proclaims, ours is a government by consent of the governed,³⁷ and prefers to test the legitimacy of the Constitution by whether it is moral and just.³⁸ She repels the notion that we "are not good enough to make our own moral decisions," to make "moral choices."³⁹ Indubitably we are free to make our own "moral choices," but it does not follow that they must be made for us by unelected, virtually irremovable judges rather than by the people themselves through their

33. 23 U.S. (10 Wheat.) 66, 120-22 (1825); see also *Nevada v. Hall*, 440 U.S. 410, 425-26 (1979); *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413 (1829).

34. Sherry, *supra* note 1, at 296.

35. Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 8 (1980).

36. See *infra* text accompanying notes 56-59.

37. "The people," said Justice James Iredell, one of the ablest Founders, "have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other . . ." James Iredell, Address to the Public, in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (Griffith J. McRee ed., Peter Smith (1949)) (1857).

Roger Sherman stated, "The greatest security that a people can have . . . is that no laws can be made to bind them . . . without their consent by representatives of their own choosing." Herbert J. Storing, *The "Other" Federalist Papers: A Preliminary Sketch*, 6 POL. SCI. REVIEWER 215, 227 (1976).

38. Sherry, *supra* note 1, at 290. The activist search for the authority or legitimacy of the Constitution derives no sustenance from the Supreme Court. The Justices are creatures of the Constitution and cannot very well question the source from which they derive their own authority. Certainly the constant appeals to the Constitution by the people and the bar testify to their belief in its legitimacy. Paul Brest stated that "the written Constitution lies at the core of the American 'civil religion.'" Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980) (quoting Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123).

39. Sherry, *supra* note 1, at 293.

elected representatives or by amendment as Article V provides.⁴⁰

Sherry erroneously asserts that no "New Right theorist" would deny that "unelected judges should have some obligation to oversee the community's moral choices."⁴¹ Wrong again. Not a scintilla of evidence remotely suggests that the Framers and Ratifiers contemplated that judges would serve as arbiters of morals. They plainly rejected the participation of judges on issues of policy,⁴² and they would have been astonished by the claim that judges have special competence in the field of morals.⁴³

Morals are not carved in stone; many view morals as products of time and place. An activist, Larry Simon, observed that "moral theory today is a 'conceptual melange'";⁴⁴ another activist, Michael Perry, considers that "[p]olitical-moral philosophy, after all, is in a state of serious disarray."⁴⁵ On such issues as abortion and death penalties, for instance, the nation is split. A "radical division of opinion," philosopher Thomas Nagel observed, indicates that there is a "case of basic moral uncertainty."⁴⁶ "[N]othing but confusion of thought,"

40. In *McPherson v. Blacker*, 146 U.S. 1, 36 (1892), the Court rejected the notion that the Constitution may be "amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."

41. Sherry, *supra* note 1, at 293.

42. Nathaniel Gorham said that judges "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." 2 RECORDS, *supra* note 20, at 73. Elbridge Gerry declared that "[i]t was quite foreign from the nature of ye. office to make them judges of the policy of public measures." 1 *Id.* at 97-98. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796), Justice Iredell stated: "These are considerations of policy . . . certainly entirely incompetent to the examination and decision of a Court of Justice." Earlier, Judge Henry spoke to the same effect in Virginia: "The judiciary . . . could never be designed to determine upon the equity, necessity, or usefulness of a law; that would amount to an express interfering with the legislative branch." *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 47 (1793). *Kemper* was a landmark case for judicial review.

43. Jefferson stated, "I cannot give up my guidance to the magistrates, bec[ause] he knows no more of the way to heaven than I do, [and] is less concerned to direct me right than I am to go right." SAUL K. PADOVER, *JEFFERSON* 44 (Mentor ed. 1952) (first alteration in original).

44. Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 619 (1985) (quoting ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 234 (1981)).

45. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 592-93 (1985) (citing MACINTYRE, *supra* note 44, at 6-10).

46. Thomas Nagel, *The Supreme Court and Political Philosophy*, 56 N.Y.U. L. REV. 519, 524 (1981). Levinson noted that insistence on a "linkage between law

Justice Holmes considered, "can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."⁴⁷ The uncertainty that bedevils "morals" likewise beclouds "justice." Although Perry would make the law more sensitive to contemporary social problems, he notes that "[m]any different and competing conceptions of justice clamor for our attention. . . . Each conception confronts serious problems. . . ." He remarks that "various considerations of self-interest have powerfully distorted the visions and pursuit of justice."⁴⁸ More important, the Framers were aware that unjust laws might be constitutional.⁴⁹

Sherry's involuted rhetoric obscures rather than enlightens. Consider her "meaning does not inhere in documents, but is created by an interaction between a document and its readers,"⁵⁰ an obfuscatory version of the current fad in literary circles that a reader is free to read into a literary work whatever he chooses. That may be well enough for a novel, but the limitations and mandates of a Constitution would be set at naught were every man free to read it after his own heart. Commonly "meaning" is defined as that which is intended. When, additionally, a writer explains what he means, the reader may not insist in the teeth of that explanation that his own, quite different "meaning" is to prevail. Concretely, when a writer explains that by a stringed instrument he means a four-stringed instrument, e.g., a violin, the reader may not maintain that the writer means a multi-stringed harp. John

and moral norms . . . assume[s] a moral consensus which no longer exists." Sanford Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 35, 99.

47. OLIVER W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 171-72 (1920). Sherry finds such "positivist" views "dispiriting" and opts for the right to make "our own moral decisions." Sherry, *supra* note 1, at 293. On the other hand, David Richards, a perfervid activist, looks askance at "judicial divination about conventional morality." David A.J. Richards, *Constitutional Interpretation, History, and the Death Penalty: A Book Review*, 71 CAL. L. REV. 1372, 1397 (1983) (reviewing RAOUL BERGER, *DEATH PENALTIES* (1982)).

48. Perry, *supra* note 45, at 577, 592-93.

49. See *supra* text accompanying notes 29-30. Justice Holmes said to his brethren many times, "I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms." THE MIND AND FAITH OF JUSTICE HOLMES 435 (Max Lerner ed., 1943). Professor Felix Frankfurter wrote that justice is not the "test[] of constitutionality." WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 54 (2d ed. 1966).

50. Sherry, *supra* note 1, at 295.

Selden, a preeminent seventeenth century scholar, stated, "[A] Man's Writing has but one true sense, which is that which the Author meant when he writ it",⁵¹ that was likewise the view of Hobbes and Locke.⁵² Such sturdy common sense is to be preferred to Sherry's "meaning is created by interaction between a document and its readers," a fancy way of saying that a judge is free to substitute whatever meaning he chooses⁵³ for the "meaning" intended by the draftsmen. In her infatuation with judicial law-making⁵⁴ Sherry overlooks that the Founders had a "profound fear of judicial independence and discretion,"⁵⁵ that they were influenced by the English Puritans' fear that "the law's meaning could be twisted by means of judicial construction,"⁵⁶ and that they feared the

51. JOHN SELDEN, *Bible, Scripture, in THE TABLE-TALK OF JOHN SELDEN, ESQ.* 7, 11 (London, William Pickering 1847).

52. Hobbes stated that the judge is to be guided by "the finall causes, for which the Law was made; the knowledge of which finall causes is in the Legislator." THOMAS HOBBS, *LEVIATHAN* *143. Locke wrote,

When a man speaks to another, it is . . . [to] make known his ideas to the hearer. That then which words are the marks of are the ideas of the speaker . . . this is certain, their signification, in his use of them is limited to his ideas, and they can be signs of nothing else.

1 JOHN LOCKE, *AN ESSAY CONCERNING THE HUMAN UNDERSTANDING* 204, 206 (Raymond Wilborn ed., 1987).

53. "Noninterpretivists devise their theories so that courts can do more." Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1032 n.80 (1992).

54. It was not ever thus; see Henry Steele Commager's scathing review of the pre-New Deal Court. Henry S. Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417, 428 (1943). Shortly before his appointment to the Court, Solicitor General Robert H. Jackson wrote, "[t]ime has proved that [the Court's] judgment was wrong on the most outstanding issues upon which it has chosen to challenge the popular branches." ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 37 (1941).

55. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 298, 304 (1969).

56. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 892 (1985).

Sherry is persuaded that the search "for rules that truly constrain judges, is bound to fail." Sherry, *supra* note 1, at 289. Minimally, that is the ideal toward which we must strive; meanwhile some measure of constraint is better than none. Story and Kent, who were closer to the Founders, had greater faith in rules. Story asked, "are the rules of common law to furnish the proper guide, or is every court and department to give any interpretation according to its own arbitrary will?

1 STORY, *supra* note 32, § 166 n.2. The Founders preferred rules, in Kent's words, to "a dangerous discretion . . . to roam at large in the trackless field of [the judges'] own imaginations." 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 373 (Boston, Little Brown & Co. 9th ed. 1858). For this they had the authority of Hamilton: "To avoid an arbitrary discretion in the courts, it is indispensable that

"judges' imposition of their personal views,"⁵⁷ very much as the anti-activists do today. Even after the creation of an "independent" judiciary, Justice James Wilson, a leading architect of the Constitution, felt constrained in 1791 to admonish his fellow Americans no longer to regard judges as "objects of aversion and distrust."⁵⁸ Against this background Sherry's brief for a freewheeling judiciary is surreal. Judge Richard Posner more realistically cautioned that "as the courts move deeper into subjects on which there is no ethical consensus, judicial activism . . . becomes ever more partisan and parochial, lawless, and finally reckless."⁵⁹

The English legal tradition has ever preferred the particular to the sweeping generalization. Goethe envied this English predilection, preferring "the common sense point of view" to that of philosophy; he criticized the German bent for "philosophic speculation."⁶⁰ William James likewise was "impatient with the awful abstract rigmarole in which our philosophers obscure the truth."⁶¹ Current academicians tend to swaddle the simplest proposition in murky rhetoric,⁶² suggesting either muddy thinking or an intention to veil the truth.

Implicit in Sherry's fancy theorizing and that of her fellows is a confession of failure to obtain from the people the

they should be bound down by strict rules and precedents." THE FEDERALIST No. 78, *supra* note 30, at 510.

57. Powell, *supra* note 56, at 891.

58. WILSON, *supra* note 30, at 292-93.

59. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 215 (1985).

60. J.P. ECKERMAN, CONVERSATIONS OF GOETHE 293, 307, 464 (1933).

61. JACQUES BARZUN, A STROLL WITH WILLIAM JAMES 137 (1983); *see also id.* at 125, 133.

62. Let one example suffice: "[C]onsider the interpretation of walking down the street. Our interpretation of this action rests on a form of holistic, viz. nonreductive explanation in which such factors as the person's rationality, beliefs, desires, capacities, and the like appear as mutually interdependent variables." Richards, *supra* note 47, at 1375. It is enough to inhibit one from taking another step.

But we lawyers have one consolation; the gyrations of contemporary "authorities" on English literature, history, and philosophy are even more grotesque. See Gertrude Himmelfarb's comments on J. Hillis Miller's analysis of Wordsworth's eight-line poem "A Slumber Did My Spirit Seal." Gertrude Himmelfarb, *The Abyss Revisited*, 1992 AM. SCHOLAR 337, 341-42. Miller's mangling of a little gem would be hilarious were it not so sad to see it represented as scholarship.

measures they desire. So they turned to the courts,⁶³ at the cost of depriving the people of the right to decide their own destiny, and placing ultimate policy decisions in the hands of Justices who can neither be overruled nor removed. Pleasing results do not justify judicial arrogation of power to rewrite the Constitution. Activists overlook Chief Justice Marshall's statement that "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."⁶⁴ The Judge, said Justice Cardozo, "is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness."⁶⁵

63. See *supra* text accompanying note 10.

64. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 190-91 (Gerald Gunther ed., 1969).

65. BENJAMIN N. CARDOZO, *Lecture III. The Method of Sociology. The Judge as a Legislator*, in *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).